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JAMES H. McKENN

PETITION FOR CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,

IN THE CASE OF THE

"SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY, CREDITS COMMUTATION COMPANY, E. H. HUBBARD, Trustee, E. H. HUBBARD, Assignee of the Union Loan & Trust Company, *Appellants*,

Petitioners,

vs.

TRUST COMPANY OF NORTH AMERICA, *Appellee*,"

Respondent.

By the said Appellants, Petitioners, who file herewith their certified transcript of record and printed brief, with the requisite copies of each.

JOHN C. COOMBS, 25 Equitable Building, Boston, Mass.,
HENRY J. TAYLOR, Sioux City, Iowa,

Counsel and Solicitors for Petitioners.

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VS.

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Respondent.

By the said Appellants, Petitioners, who file herewith their certified transcript of record and printed brief, with the requisite copies of each.

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court of the United States for its review and determination the case of the Sioux City Terminal Railroad & Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, E. H. Hubbard, Assignee of the Union Loan & Trust Company, Appellants, vs. Trust Company of North America, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of appellants respectfully shows to this Honorable Court as follows:

1. That this petition is brought primarily on behalf of the Credits Commutation Company, judgment creditor, and the other appellants are joined herein mainly, if not wholly, that they may be under jurisdiction to obey and be bound by any order or decree that this Court may see fit to enter in the premises.

2. The Sioux City Terminal Railroad & Warehouse Company, called herein the Terminal Company, is an Iowa corporation, was organized in September, 1889, and purchased grounds for terminal facilities prior to January 1, 1890, and a portion of the same thereafter, and proceeded at or about said date to prepare said grounds for the laying of terminal tracks, and later, in 1892–3, built thereon its union depot.

3. Prior to January 1, 1890, the Terminal Company had executed its notes in the sum of $5,000.00 each, which were deposited with and negotiated by and under the endorsement of the Union Loan & Trust Company, of Sioux City, Iowa, note by note, to different banks and bankers throughout the country, mainly in the Eastern states, and for its endorsement and negotiation the Trust Company received a small commission. The proceeds of these notes purchased the property of said Terminal Company, there being no cash received upon its stock, the entire issue of which, $1,000,000.00 par value, was finally given to the Sioux City & Northern Railroad for the control of a few franchises or rights of way upon certain streets and alleys, having no substantial value, but serving as a form or subterfuge under which to issue the Terminal stock.

4. The aggregate indebtedness represented by these different $5,000.00 notes so negotiated to various and different parties throughout the country was, on January 1, 1890, about $1,250,000.00. This amount was at different times more or less reduced,

but the larger part of it by renewals and substitutions continued in the same form of these six months $5,000.00 notes until at the time of the failure of the said Union Loan & Trust Company, which had negotiated the same under its endorsement and of which Appellant E. H. Hubbard became assignee for the benefit of creditors on the 25th day of April, 1893, there was outstanding of these notes the aggregate sum of $718,000.00. In reference to this note indebtedness, it is stipulated (transcript, pp. 243-4) between the parties to this suit "that there are outstanding, due and unpaid notes of the Sioux City Terminal Railroad & Warehouse Company negotiated through the Union Loan & Trust Company under its endorsement to the amount of $718,000.00," and in said stipulation further described as the notes to which reference will constantly be made in this petition, and including as a part thereof the notes purchased and herein represented by the Appellant Credits Commutation Company, which subsequently to 1893 became the owner of $616,000.00 principal of said outstanding notes, and on July 23, 1895, reduced the same to judgment against said Terminal Company for the amount of said principal, $616,000.00, and interest, $75,596.95, on which general execution was at once issued and returned wholly unsatisfied. Whereupon said Credits Commutation Company, judgment creditor, appellant and petitioner herein, intervened by permission of court in this suit which had been commenced in the preceding year, but which had not gone to decree.

This suit is brought by the Trust Company of North America to foreclose an alleged first mortgage executed by the Terminal Company upon all its properties, rights and franchises, dated January 1, 1890, and purporting to secure 1,250 bonds of the amount of $1,000.00 each par value of said Terminal Company, which bonds, to the amount of $1,000,000.00 were negotiated for substantial value in July, 1890, and the remaining $250,000.00 thereof were not sold until the summer of 1893, prior to which later date the identical notes represented herein by Appellant

Credits Commutation Company, judgment creditor, were all actually outstanding.

5. The Terminal Company got the benefit of proceeds of the notes and of the bonds. Indeed, the proceeds of the earlier notes, herein retained by renewals and substitutions, purchased the property covered by the mortgage in controversy.

6. The negotiation of the notes took place in single transactions with separate parties, each note for $5,000.00, and making no disclosure upon its face or otherwise of other notes or other indebtedness, and the validity of this indebtedness of petitioner is admitted by stipulation in the record. (Transcript, pp. 243-4.)

7. Each bond, (Transcript, p. 144) however, referred to the mortgage in controversy and upon its face disclosed the fact that each bond was a part of an indebtedness aggregating $1,250,000, as a single transaction. The mortgage fixes the issue at the same amount. (Transcript, p. 143.)

8. The authorized capital stock of this Terminal Company was only $1,000,000, and the company was permitted (Transcript, p. 190) to commence business when only $200,000 of said capital stock had been subscribed. Only this last amount had been subscribed or issued at the date of the bonds and mortgage.

9. The articles provided (Transcript, p. 191) that "the highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

10. The statute law of Iowa, §1611 of McClain's Code of Iowa, originally read thus:

> "Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock."

Chapter 22 of the laws of the 20th General Assembly, 1884, added the following proviso:

> "Provided, that the provisions of this section shall not apply to the bonds or other railway securities to be hereafter issued or guaranteed by railway companies of this state, in aid of the location, construction and equipment of railways, to the amount of not exceeding sixteen thousand dollars per mile, single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway actually constructed and equipped."

In 1886, Chapter 54 of the laws of the 21st General Assembly, made this further addition or second proviso, to-wit:

> "Provides, further, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of such debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

11. The appellant, Credits Commutation Company, judgment creditor, with the validity of its indebtedness admitted under stipulation in this suit, defends against the foreclosure of said mortgage, and the establishment of the entire indebtedness purporting to be represented by the bonds securing the same, on several grounds, one of which is that the execution of said mortgage and the incurring of said indebtedness are *ultra vires* and unlawful.

THE MORTGAGE TO THE TRUST COMPANY OF NORTH AMERICA AND THE BONDS PURPORTING TO BE THEREBY SECURED ARE ULTRA VIRES AND UNLAWFUL.

12. Said Credits Commutation Company, judgment creditor, contends that said indebtedness violates the provision of

the statutes of Iowa above quoted, which prohibited a corporation from incurring an indebtedness beyond two-thirds of its capital stock. The articles (Transcript, p. 191) says "paid up capital stock," of which there never has been any. The authorized capital stock of the Terminal Company has never been to exceed $1,000,000.00, and therefore the incurring of the single indebtedness represented by the mortgage and bonds in controversy, aggregating $1,250,000.00, was *ultra vires* and unlawful, and is so found by the Circuit Court of Appeals, the full opinion of which is hereto annexed as Exhibit "A," pp. 25–43 hereof.

13. The Circuit Court, on the hearing, in so far as the statements made at the time of the hearing can be used as a criterion, seemed to favor the contention of this judgment creditor, but in the decision of that Court, the mortgage and bonds in controversy were sustained under a construction of the statute of Iowa. The opinion of the Circuit Court is printed in full in the Record, pages 263-272.

14. The Circuit Court of Appeals, for the purpose of its decision, conceded that the bonds and mortgage did not fall within the saving provisions of the statute, and rested its decision upon entirely different grounds from that of the Circuit Court, to wit: Upon the ground that he who seeks equity must do equity, and therefore the mortgage and bonds in controversy could not be assailed while the proceeds were not tendered back by the Terminal Company, and that the Credits Commutation Company, judgment creditor, has no equitable claim to attack the mortgage and bonds superior to that of the Terminal Company itself. This petition for the writ of certiorari is asked on behalf of the Credits Commutation Company, judgment creditor, in the belief that its position in a case determined, as was this by the Circuit Court of Appeals, upon relative equities, is superior to the position of the Terminal Company, and that even if such is not so, still the petitioner's defense should prevail to the extent

that the admittedly valid indebtedness represented by the notes should pro rate with the indebtedness represented by the bonds in the Terminal property, each alike without benefit of security.

15. The indebtedness represented by this judgment creditor as individual notes antedates the sale of 250 of the Terminal bonds, and by substitutions and renewals, reaches back in a continuous line of indebtedness represented by like notes to a date prior to the sale of any of the bonds, or the giving of the mortgage. The indebtedness of this judgment creditor is by stipulation admitted to be a valid indebtedness of the Terminal Company. Even without this admission the validity would still be unquestionable. Each note of $5,000 is a separate and single transaction not disclosing the aggregate indebtedness. In the sale of each note, the Terminal Company, as a matter inherent in each several transaction in law is presumed to represent that it had the authority to create the indebtedness, and each transaction itself amounted to a presumption conclusive against the Terminal Company of that lawful authority and a practical warranty to each noteholder that the statute in reference to indebtedness had not been exceeded nor violated. It may be true that in each transaction the Terminal Company was doing an unlawful thing and was taking the money of each noteholder under the certain, but concealed, inability to pay the same. The guilt of the Terminal Company in the transaction is complete. The innocence of each noteholder is absolute. Moreover, the validity of our indebtedness is admitted, and is therefore not before this Court for determination. The controversy, however, is not limited to the noteholder and the Terminal Company, but is tripartite, involving the Trust Company of North America in its assertion of its mortgage and bonds thereby secured. It may be admitted that as between these bondholders and the Terminal Company, the equities are in favor of the bondholders and against the Terminal Company. The guilt of the Terminal Company in that transaction as in our transaction may be admitted, but it

cannot in that transaction be stated that the bondholders are innocent. Each bond disclosed upon its face to its owner that it is a part of an indebtedness that violates the statute law of Iowa, that said indebtedness is created, and that every bond is issued against the prohibition of said statute. The indebtedness is unlawful, and while the equities relatively may measure higher in behalf of the bondholders than in behalf of the Terminal Company, it still remains that the bondholders deliberately, designedly, intentionally, entered into a transaction that not merely disregards but violates the plain provisions of the laws of the State of Iowa, as well as the articles of incorporation of the Terminal Company. This is not a case where by piece-meal an indebtedness within the knowledge of the Terminal Company, but without the knowledge of its creditors, creeps beyond the statutory limitation. It is not a case where even with extrinsic knowledge an indebtedness is created and incurred which, in and of itself, is within the limitation. This is not a case where the bondholders could sue upon their bonds, and in the presentation of them to the Court to sustain their case, would not disclose violated law. Distinctions are sometimes made on the basis of being able to sustain an action without, on the face of the instrument, disclosing violated law, and on this state of facts recoveries have been had, even where by extrinsic evidence the violation of law might have been shown, but the showing of such violation did not inhere into the *prima facie* basis of recovery. No recovery, however, is possible upon these bonds or mortgage, either or both, in a court of equity or in a court of law, that does not, in the making of the *prima facie* case, disclose to the Court that they rest upon and represent a transaction that offends against the plain prohibitions of the laws of Iowa, and the articles of association. The question of violated law as to these bonds is a question of simple arithmetic. Two-thirds of $1,000,000= $666,666. That refers to authorized, not actually issued, stock.

Board of Com. v. Potter, 142 U. S., 355.

It yet remains to be declared in Iowa or elsewhere that a single transaction of itself so large as to violate law will be sustained on the contracts, even against the company that has received and retained the benefits and proceeds thereof, and certainly not where sustaining the mortgage gives to the unlawful transaction a priority over *bona fide* debts and thus takes everything. As against *bona fide* debts, the unlawful should not in equity be affirmatively given the full fruits of lawful transactions.

16. We do not ask the Court to determine necessarily what would be its declaration of law or equity as between the bondholders and the Terminal Company. The controversy presented is limited to a declaratien of equities between the bondholders and this judgment creditor, and the question is further presented to the Court for a declaration of these equities under an offer of this judgment creditor made in the Circuit Court, and made again in the Circuit Court of Appeals, and now repeated in this Court, to-wit: The bonds to *pro rate* with the indebtedness represented by the Credits Commutation Company, appellant herein, and neither party to receive any benefit from the security other than the *pro rata* distribution of the proceeds of the sale of the Terminal property. It was in essence an offer by this creditor to waive all liens, titles and priorities in his own behalf if the mortgage should be found to be unlawful, provided the Court would impose like waiver on the mortgagee as a condition to any enforcement of its unlawful claim, and to the end that all creditors of the insolvent Terminal Company might thus share equally and *pro rata* in its assets.

THE OFFER OF THE PETITIONER IS AN OFFER TO DO EQUITY.

17. It is anticipated that every Court of Equity should have an initial impulse to uphold these bonds, or to afford a relief equivalent to the mortgage as against the mortgagor. Every Court wants to do so simply.

Such a desire is a native vigor of equity and could be met in only two ways: first, by imposing insuperable legal bars; or, second, by yielding to the equity until its just requirements should be satisfied.

But the bonds, too, were in such counter plight that resort could be had to but two devices in their behalf:

First: To force a construction of the exception in the proviso of McClain's Code, ss. ~~1610~~, 1611, *supra*, and rule that that exception includes and validates the bonds. This would avoid all legal obstruction and render consideration of the equities unnecessary and impertinent.

The Circuit Court took the dilemma on that horn, and tried to so hold, but whether its opinion did this successfully, or was itself impaled, the Circuit Court of Appeals expressly leaves undetermined, but is willing to concede the latter.

Second: To deny the validity of the bonds, but to enforce their obligations because "good faith, justice and equity demand it," and on the maxim that "he who seeks equity must do equity." That was the course adopted by the Circuit Court of Appeals.

18. Again, there are two appellants, but both practically defendants, both represented by the same counsel, but having different purposes which various interests require to be preserved. They are the Terminal Company and the judgment creditor, the latter standing, formerly, on the conveyance made to Hubbard for its benefit, and now, also, on its judgment and the lien thereof.

It was for the interest of the defendant company to deny all indebtedness and liens, and to retain its property free from all obligations.

The judgment creditor can only have the payment of his debt. He has no interest in the obligations of the bonds, or in any question of their validity. He is interested in the question of the validity and priority of the mortgage, but only in so far as

it encroaches upon the assets or the lien of his judgment. He simply objects to the enforcement of the mortgage against his own interests.

In the foregoing situation—comprehending either of the two decrees which the bondholders might attempt to obtain—one to sustain the validity of the bonds, or another for relief in equity equivalent to the mortgage, and the two expedients which might be tried to meet these attempts, and the different purposes of the two parties or defendants who had any interest to oppose the bonds or mortgage—the case went to trial, and the Circuit Court sustained the validity of the bonds as within the exception in the proviso in the Code, ss. ~~1610~~, 1611, *supra*. (Transcript, pp. 265-8.)

19. The construction of the Circuit Court does violence to the language and purpose of the statute. Nothing can be found therein which lends plausibility to such a construction or that such a theory as to the effect of the whole section was contemplated by the law-making power. It was not intended that the proviso should generally extend the limit of indebtedness that Iowa corporations may incur, but that it simply excepts a specific class of indebtedness from the application of the theretofore generally limiting statute. The construction of the Circuit Court is extremely perilous to the interests of those dealing with corporations as well as dangerous to public policy. If it correctly declares the law, the bar of the statute is thrown down, and there is practically no limit left upon the indebtedness which a railroad or land corporation in Iowa may incur except the conscience of the corporate officers.

The bonds of the Terminal Company in controversy secured by mortgage to the Trust Company of North America upon its properties, do not come under and are not saved by the provisions of this second proviso. It is a matter of common knowledge that this provision was secured in 1886 by corporations in

Iowa doing a farm mortgage loaning business. The capital of these corporations derived from their stock was not used to purchase real estate, but was loaned out upon farms in usually small and varied amounts. The purpose of the law was to permit loan companies to deposit with a trustee large numbers of these farm mortgages, which consisted of ordinary notes secured by ordinary farm mortgages, and to issue debentures or bonds, commonly called "debenture bonds," which bonds were secured by these farm mortgage real estate securities in the hands of the trustee and such debentures or bonds, properly identified and certified by the trustee, were by the corporation sold and the money derived therefrom used to further prosecute the loaning business. Such loaning company usually made its farm loans on the basis of one-third and not to exceed one-half of the value of the real estate or farm. And so back of all these farm mortgages, there rested real estate of at least twice the value of the securities. Under this law these loaning companies were authorized by issuing their debentures or bonds to become indebted in excess of two-thirds of their paid up capital stock, and even to the full extent of their assets if the proceeds of their stock should be all used in making these farm or real estate loans.

The language of the second proviso is that the company may issue its debentures or bonds, "the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of the purchasers of said debentures or bonds." The act does not say nor mean debentures or bonds secured by mortgage upon its own real estate. This was not its purpose. The "real estate securities" contemplated by the act were securities owned by the company, but not upon real estate owned by the company. The debentures or bonds provided for are not ordinary terminal or railway bonds secured by the property of a railway or terminal company in mortgage or trust deed form, but refer to a term then and now in common use, to-wit, debentures or bonds secured not by mortgage upon the maker's

own real estate, but secured by real estate securities, a term also to be given its ordinary and accepted meaning, and these real estate securities are to be actually transferred, presumably to some trustee or person acting in like capacity, for the protection of the purchasers of these debentures or bonds. These securities, not the real estate security, must also be at least equal in amount to the par value of such bonds or debentures, which implies that these bonds or debentures are protected or secured, not by real estate security in the form of a mortgage upon real estate of the corporation, but by real estate securities owned by the corporation and capable of actual transfer, to-wit, notes and bonds, secured by real estate mortgages. Real estate securities in this act mean evidences of indebtedness secured upon real estate and include not only the real estate mortgage, but the note evidencing the indebtedness so secured by mortgage or other lien, and such securities are further to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon. To say that "such securities (are) to be at least equal in amount to the par value of such bonds or debentures" shows that the act refers to securities rather than to corporate real estate. The word "amount" means and refers to the aggregate total or sum of securities and not to the value of corporate real estate. The word "worth" in the next line refers to the worth not of real estate of the corporation, but of third parties on which the securities owned by the corporation are first liens. The "actual transfer" of these securities is not a mortgage but a delivery to a trustee who holds merely the real estate securities and not real estate security. The loans upon the real estate are complete before the bonds or debentures are issued, and these consummated loans are the "securities." In other words, there exists originally the evidence of indebtedness and the instrument securing it upon real estate, and these are complete in themselves and both are necessary in order to make up real estate securities. The bonds or debentures are instruments afterwards executed,

are wholly separate, are not liens upon real estate, and are not the instruments or evidences of debt secured directly by the mortgage, but only indirectly by these collateral real estate securities held in trust. If one were to examine such real estate security as the act contemplates, to ascertain the debt that it secures, he would never be referred on the face of the instrument to the bonds or debentures permitted to be issued under this provision by the corporation. Such security would be absolutely silent as to any debentures. The debentures would refer to the securities, but not the securities to the debentures. All the real estate securities, both in the form of the notes and the mortgages going with them, could be read through and through and there would be no intimation or information as to the proposed bonds or debentures provided for in this second proviso. If the act intended that debentures were to be secured by an actual transfer of real estate, then the legislature would have omitted the word "securities."

It is difficult to argue a question of construction. The Circuit Court, in its attempt at construction, acknowledged the difficulty, and we think reached an illogical and unwarranted conclusion. He states, page 265, that by the second proviso it is declared that this two-thirds limitation shall not apply to debentures or bonds secured by a first lien upon unincumbered real estate worth at least twice the amount loaned thereon. The language of the proviso is not consistent with this statement, for the proviso is that these debentures or bonds are to be secured, not by a first lien upon unincumbered real estate directly, but by real estate securities, which securities are to be first liens upon real estate worth at least in each instance twice the amount loaned thereon. These real estate securities represent completed and consummated loans already made and owned by the corporation in the form of the ordinary note and mortgage or real estate security. The loans which constitute the securities must be made before the bonds or debentures can be

issued, and while indirectly the latter may be secured upon real estate, they are directly to be secured by "real estate securities." Of course these bonds and debentures are for the purpose of raising money, but they are not the original loans evidenced by the real estate securities referred to in the act. The Circuit Court says, page 265:

> "The theory of this section seems to be that if bonds of the corporation are secured upon real estate worth at least twice the amount loaned thereon, they will be paid out of this security and thus there will be left for the benefit of other creditors the security derived from the capital stock of the corporation."

We do not think that anything like this was in the contemplation of the law-making power. The only rational theory of the section is that the second proviso was added to enable loan companies to use the securities derived from loans made with the proceeds of the capital stock of the corporation as collateral to its debentures; that is, to use the proceeds of the capital stock of the corporation in whole or in part, in making ordinary real estate loans, which loans constitute these "real estate securities." The law was not intended to reach such corporations as invested the proceeds of their capital stock in real estate owned by themselves, but in loans secured upon other real estate.

The Circuit Court says that the trust deed to the Trust Company of North America is a real estate security (page 266) and that the execution and delivery thereof to the trustee was an actual transfer of real estate security for the benefit of the purchasers of the bonds described in it, and consequently that these are within the provision of the act, but we do not so understand the language of the act. It is true that the trust deed to the Trust Company of North America secured this $1,250,000.00 of bonds, and that the trust deed is real estate security, but it does not satisfy nor come under the plain provisions of the act. These Ter-

minal bonds and trust deed are the original evidences of the loan, but the real estate securities referred to in the act are evidences of loans previously made and completed.

Cook on Stockholders in volume 2, section 777, third edition, says:

> "In the United States the 'debenture' is new and has no clearly defined place among the securities of corporations. A so-called debenture, however, is rapidly coming into use in this country. Its character and issue are as follows: Certain corporate assets, generally railroad bonds or stock, or real estate mortgages or municipal bonds, or water-works bonds, are deposited with trustees to secure the debenture holders. The debenture itself is a bond or note of the corporation, reciting on the face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of security has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering bonds or stock as collateral security."

The first proviso covers the subject of railways, and it may be presumed that the second proviso had reference to other corporations or subjects.

Se we contend for this act that it refers, not to these Terminal bonds secured by trust deed or mortgage upon the Terminal real estate, but to other bonds or debentures that would or might be secured by pledge of securities as collateral. The statement of Cook gives the common acceptance and understanding of the language of the Iowa Code, and the construction of the Circuit Court is erroneous and violates the intention of the legislature and the common and accepted meaning and understanding of the words of the statute. This being so the "two-thirds limitation" of the

statute applies to the Terminal bonded indebtedness, and this limitation might be decreased but cannot be increased by any provisions of the charter of the corporation.

THE OFFER AND THE THIRTY-EIGHTH ASSIGNMENT OF ERROR.

20. The offer made in behalf of the judgment creditor was printed in the appellants' brief in the Circuit Court, as follows:

> "Should this mortgage be declared to be void and the conveyance to Hubbard allowed full priority to the exclusion of the bondholders, at least that great principle of justice founded upon equality, which equity first and always promulgated to govern insolvencies, would not be satisfied.
>
> A court of equity has always the right to refuse to go on when its action in behalf of either party must necessarily do some wrong to the other. And it is for this reason that such courts have uniformly suggested compromises when the occasion called for them.
>
> To that end, therefore, while praying that this mortgage may be declared null and void, we are willing to take a decree to that effect, conditioned upon the waiver or a declaration of nullity of the deed to Hubbard, so that all creditors of this Company shall share *pro rata* in the assets."

The offer was made without waiting to take the chances of getting more, and covered two-thirds of the entire interest at stake; and when made by an innocent creditor, standing to defend a valid and solid judgment of a court of law, to the conscious taker of an unlawful mortgage who can ask no legal but only equitable relief, the offer, it is submitted, deserves such consideration as should entitle the maker to be heard upon it, and to learn if it does not satisfy the requirement of the innate equities in behalf of the bondholders as against such creditor.

What is equity as between these two in this case is an open question.

The offer was persisted in, even after the Circuit Court had rejected the grounds upon which the Circuit Court of Appeals bases its decree, and had been able to find for the complainant only upon a construction of the statutes which was palpably erroneous.

21. The thirty-eighth assignment of error was based upon the offer, and is as follows:

> "38. Because the Court erred in not permitting the Credits Commutation Company, judgment creditor, to share at least *pro rata* with said Trust Company of North America in the proceeds of the sale of said Sioux City Terminal Railroad & Warehouse Company properties."

This error was also reflected in other assignments, and in appellants' brief before Circuit Court of Appeals these assignments were condensed into what is therein designated assignment of error number 15. Said condensed assignment number 15 of appellants' brief is as follows:

> "15. The Circuit Court erred in not permitting E. H. Hubbard, assignee and trustee, and especially the Credits Commutation Company, to share, if not in priority, then *pro rata* at least, with the Trust Company of North America in the proceeds of the sale of the Terminal Company property."

22. Following this up at the hearing before said Court of Appeals, the senior counsel for the appellants orally renewed the offer on which the assignment rested.

It was made to meet this difficulty: The appellants deemed it impossible for the Court to invoke the maxim that "he who seeks equity must do equity," as against the defendant, or judgment creditor, for the seemingly conclusive reason that neither of the appellants was seeking equity or anything else from the

Court. The defendant filed no cross bill, and the creditor could not intervene for any purpose but the protection of his own interest. Besides, his interest was legal and not equitable. Both appellants even fought the jurisdiction from beginning to end. The maxim could not apply. For these reasons the creditor appellant thought that the equity must be tendered by him, and could not be exacted as a condition.

It was conceived that the rule that equity could ask nothing of a defendant might work an injustice. It is not true that a defendant can have affirmative relief in equity only by cross bill. It was clear in this case that the defendant would get affirmative and equitable relief by a purely negative answer if sustained.

So of the judgment creditor. If he were admitted simply to contest the complainant's mortgage, and were successful, the result would be that, though standing apparently upon the defensive, or asking only for the dismissal of the bill, he would be let into a prior lien and would get everything, and the bondholders nothing.

It is true that the judgment creditors did not know that their claims added to others, were, in the aggregate, excessive, and the bondholders did know that their own claim was so in itself, which, in conscience, supports the result that, in claims attacked for excessiveness, the more excessive may indeed be the more valid.

23. Nevertheless, the judgment creditor thought that to have the law sustained he should eliminate inequitable results, for, after all, the contention between him and the bondholders was, as it stood, one for strict priorities, which are always distasteful to courts of equity, especially in cases of insolvency. It was not an offer whose generosity was inspired by fear on the part of the offerer that he was not entitled to anything, and so should ask for but little; it arose from the fear that, though entitled to all at law, he would not get anything unless he conceded much to

equity — all that was asked of him. It was premised upon the unlawfulness of the bonds which the Circuit Court of Appeals has now found.

The offer is very large in amount. If the property was worth $1,250,000 — and nobody thought less — the offer was worth at least $800,000. This Court will truthfully surmise that the conscience of the defendant company (in whose behalf the law seemed to be a bar) was considerably racked in behalf of the judgment creditor (in the minds of their common counsel) before any such concession could be made. Is it enough?

Assuming that the case is governed by the maxim that "he who seeks equity must do equity," what does that require of the parties?

24. As between the judgment creditor and the bondholder, neither of whom knew that the other existed, good faith, justice and equity require nothing except for this:

The bondholders might have expected that there would be such creditors, but the creditors had statutory assurance that there could be no such bondholders without a violation of law such as the Court has found. The Court has also found that the bondholders were conscious of the violation, for the face of every bond disclosed and proclaimed it, and equity will keep in mind that it is the enforcement of the violation, the very excess between what would have been valid and what is invalid, that leaves the creditor hopeless, utterly.

If it be conceded that the parties are equally honest, yet when one of two such must suffer from the violation of law by either, it ought not to be hard to determine which.

The judgment creditor was more cruelly deceived by false representations of security than were the bondholders, if it can be pretended that the latter were deceived at all, when they knew that they did not have any that was lawful.

The bonds and the notes are equally renewals of extensions of earlier notes, given, in fact, in most instances, to the same holders.

The money of both went, alike and indiscriminately, into the property, and, without the contributions of each, it would not be sufficient to pay either, and is not enough to pay both.

In such cases, and in insolvency also, the ultimate rule for the determination of claims that may compete is that they are respectively entitled to such "proportion of the fund as they or those they represent may be supposed to have contributed to it."

Millers' River National Bank vs. Jefferson, 138 Mass., 112.

The contributors are the distributees.

This is a case of insolvency, and it is exactly in such cases that the maxim that "he who seeks equity must do equity," is construed to require nothing of creditors, as between each other, but equality.

In such cases equity will enforce equality as against priorities and preferences, whenever it can, and all statutory insolvent and bankrupt laws detest preferences.

To cases of insolvent corporations, the maxim of equality has always been held to be especially applicable, and there are but few Courts that have held that directors may violate it in securing a preference even for a lawful debt to themselves.

Equity in England substantially abrogated the laws and rules for preferences in insolvent estates of deceased persons, in behalf of equal, *pro rata* distribution.

25. As we understand the decision, the Circuit Court of Appeals finds these bonds and the mortgage to be unlawful, and sustains their enforcement against nobody, except in equity. In law they have no standing, even with claims of other creditors,

and equity never yet created a preference as between equal, equitable claims, and surely not in behalf of one that was equitable only, and against the rest that were both legal and equitable.

The bondholders take nothing on the legality of their bonds and mortgage, but everything from the good conscience and equity of the Court. They cannot complain if the Court shall be careful to give to them no more than is required by the same justice and equity on which alone they take anything. Indeed, we adopt the language of their own brief before the Court of Appeals when, departing from their complaint and abandoning the ground on which the decree of the lower Court sustained the validity of their contract, they said:

> "The Court may hold it to be void or valid as equity and good conscience may require. The parties may so act as to make it valid or void, and many conditions may arise which would influence or modify the opinion of the Court on that question."

The interests involved are not only very large in value, but also in their influence upon other properties. If this decision be added to those in Iowa, which hold that creditor directors of insolvent corporations may secure preferences to themselves, there will be but little protection in law or fact for any creditors, but directors, of Iowa companies. And such mischief to credit is incalculable. It is submitted that the case is worthy of all the time and consideration which the Court can possibly afford to it.

THE TERMINAL COMPANY HAD NO AUTHORITY TO MORTGAGE ITS PROPERTY.

26. The Terminal Company is a quasi public corporation organized under chapter 139 of the acts of the 20th General Assembly of Iowa and has no authority to mortgage its property. We understand that in the case of quasi public corporations, leases and mortgages that alike disable the corporation from per-

forming its duties to the public and the state are *ultra vires* and void as against public policy, unless there is express consent of the sovereign to the making of the lease or the mortgage. This mortgage, covering all property, rights and franchises of every form, nature and description possessed by the Terminal Company, cannot be said to be any aid or incident to the purposes of the company, in that it could lead only to self-destruction, and therefore the law of *ultra vires* applicable to leases applies in its reason and authority to this mortgage. The argument of this will appear in the accompanying brief.

The petitioners have filed in support of this petition for certiorari under separate cover, their brief, to which the attention of the court is earnestly directed.

Respectfully submitted,

JOHN C. COOMBS,
25 Equitable Building,
Boston, Mass.,
HENRY J. TAYLOR,
Sioux City, Iowa,
Of Counsel for Petitioners.

JOHN C. COOMBS,
HENRY J. TAYLOR,
Petitioners' Solicitors and Counsel.

STATE OF IOWA, }
WOODBURY COUNTY, } ss.

Henry J. Taylor, being first duly sworn, says that he is one of the attorneys and of counsel for the above named petitioners, and as such, in conjunction with Mr. John C. Coombs, had personal charge for said petitioners of the case in the foregoing petition mentioned in the Circuit Court of the United States, for the Northern District of Iowa, Western Division, and in the

United States Circuit Court of Appeals for the Eighth Circuit; that he has read the foregoing petition for Writ of Certiorari by him subscribed, and that the facts therein stated are true to the best of his information and belief.

HENRY J. TAYLOR.

Subscribed in my presence and sworn to before me by the said Henry J. Taylor, this 4th day of November, A. D. 1897.

E. A. BURGESS,

{SEAL}

Notary Public within and for Woodbury County, State of Iowa.

EXHIBIT "A."

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

No. 801.— MAY TERM, A. D. 1897.

The Sioux City Terminal Railroad and Warehouse Company, Credits Commutation Company, E. H. Hubbard, Trustee, and E. H. Hubbard, Assignee of the Union Loan and Trust Company, Appellants, vs. The Trust Company of North America, Appellee.	Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Mr. John C. Coombs and Mr. Henry J. Taylor for Appellants.
Mr. Asa F. Call for Appellee.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

The case is stated in the opinion.

SANBORN, J., delivered the opinion of the Court.

This is an appeal by the mortgagor and subsequent lienholders from a decree of foreclosure of a first mortgage for $1,250,000 upon the property of the Sioux City Terminal Railroad and Warehouse Company of Sioux City, Iowa, hereafter called the Terminal Company. The appellants challenge this decree on many grounds.

1. At the threshold of the investigation, they meet the complainant with the charge that the court below had no jurisdiction of the case, because some of the defendants were citizens of the same state as the complainant. The complainant was the Trust Company of North America of Philadelphia, Pennsylvania, hereafter called the Trust Company, and it was a corporation of the State of Pennsylvania. It was the trustee for the bondholders secured by the first mortgage made by the Terminal Company, and it brought this suit to foreclose that mortgage on April 17, 1894. The Terminal Company was a corporation of the State of Iowa. The Trust Company made the Terminal Company and a large number of individuals and corporations parties defendant. Among the latter were several banks which had liens upon the mortgaged property subsequent to that of the first mortgage, and which were corporations of the State of Pennsylvania. On June 19, 1894, the Terminal Company and several other defendants demurred to the bill on the ground that the Circuit Court had no jurisdiction because the Pennsylvania banks were corporations of the same state as the complainant. On the next day, the complainant, by leave of the Court, dismissed its suit as to the Pennsylvania banks, and the Court on the same day overruled the demurrers, and consolidated with this suit another which had been previously brought in that court to foreclose a second mortgage upon the property of the Terminal Company. One of the defendants in the latter suit was a citizen of the same state as one of the complainants therein. On June 24, 1895, the Pennsylvania banks presented a petition in this suit in which they alleged that they had judgment liens upon the property and asked that they be admitted to the consolidated suit as parties defendant. Their request was granted and the suit then went to decree.

The general rule in chancery is that all those whose presence is necessary to a determination of the entire controvery must be, and all those who have no interest in the litigation between the immediate parties but who have an interest in the subject-matter of the litigation which may be conveniently settled therein, may be made parties to it. The former are termed the necessary, and the latter the proper, parties to the suit. The limitation of the jurisdiction of the Federal Courts by the citizenship of the parties

and the inability of those courts to bring in parties beyond their jurisdiction by publication, has resulted in a modification of this rule and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controvery that a final decree between the parties before the Court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter, which is separable from the interest of the parties before the Court so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court or the suit will be dismissed. The complainant may join every proper party and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the Court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the Court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the Court as to the parties before it, the suit may proceed without him and the decree will not affect his interests. Revised Statutes, Secs. 737, 738; Equity Rule 47; *Chadbourne's Executors* v. *Coe*, 10 U. S. App. 78, 83, 2 C. C. A. 327, 51 Fed. Rep. 479, 480, 481; *Shields* v. *Barrow*, 17 How. 130, 139; *Ribon* v. *Railroad Companies*, 16 Wall. 446, 450; *Coiron* v. *Millaudon*, 19 How. 113; *Williams* v. *Bankhead*, 19 Wall. 563; *Kendig* v. *Dean*, 97 U. S. 423; *Alexander* v. *Horner*, 1 McCrary 634; *The Cole Silver Mining Co.* v. *The Virginia and Gold Hill Water Co.*, 1 Sawyer, 685. The Pennsylvania banks held judgment liens upon the mortgaged property later in date than, and inferior in equity to, the lien of the Trust Company's mortgage. They were not indispensable parties to the suit, because their interests were separable from those of the other parties to it, and a final decree which would do complete justice between them might be rendered without immediately affecting the interests of these banks. A decree of foreclosure in a suit to which they were not parties would have

left their liens upon the equity of redemption unforeclosed and unaffected. Moreover, their joinder would oust the jurisdiction of the Court as to the other parties to the suit, because they were corporations of the same state as the complainant. When this suit was commenced, therefore, the Trust Company had the option to join or to fail to join these banks as parties defendant, and the Court had the right to proceed without making them parties, under the decisions which we have cited and under the 47th equity rule, which embodies these decisions and reads:

"In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

If the complainant had not joined these banks, the jurisdiction of the court would have been impregnable. Was it destroyed because the Trust Company made them parties defendant, and then with the leave of the court dismissed them from the suit? In *Cameron* v. *McRoberts*, 3 Wheat. 590, McRoberts, a citizen of Kentucky, brought a suit in equity in the District Court of the United States for the district of Kentucky, which then had the jurisdiction of a circuit court, and obtained a final decree. There were three defendants to this suit, one of whom, Cameron, was stated in the bill to be a citizen of the State of Virginia, but the citizenship of the others did not appear. A motion to set aside the decree was made on the ground that the court had no jurisdiction because the two defendants whose citizenship was not stated were in fact citizens of Kentucky. Two of the questions certified to the Supreme Court were: "Had the district court jurisdiction of the cause as to the defendant Cameron and the other defendants? If not, had the court jurisdiction as to the defendant Cameron alone?" The answer was: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested)

could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." Courts do not require the performance of idle ceremonies. The Trust Company might have prevented this objection to the jurisdiction of the court by neglecting to join the Pennsylvania banks as defendants. The circuit court could have removed it by permitting the complainant to dismiss this suit and to commence another against all the defendants except the Pennsylvania banks. No reason occurs to us why it might not have obviated it by permitting the complainant to dismiss the banks from this suit. Our conclusion is that the complainant in an equity suit in the Federal courts is not required to join any but indispensable parties to the suit when their joinder will oust the jurisdiction of the court, and if he does join them the court may permit their dismissal, and thereupon it has the same jurisdiction and power to proceed to a decree in the case that it would have had if they had never been made parties to it.

Nor could the subsequent introduction of these banks and other parties into this suit for the purpose of protecting their own interests affect the jurisdiction of the court. When the banks had been dismissed the circuit court had jurisdiction of the subject matter and of the parties to the suit. It also had the possession of the mortgaged property, which was then in the hands of its receiver. A suit which had been previously commenced in the same court was consolidated with this suit, and the Pennsylvania banks, on their own petition, were permitted to be made parties defendant to protect their own interests, but all these proceedings were ancillary and subordinate to this suit to foreclose the first mortgage, and all the parties thus brought into this suit were, in effect, interveners for their own benefit. It was immaterial that some of them were citizens of the same state as the complainant. Consolidations and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought into it may be. *Phelps* v. *Oaks*, 117 U. S. 236, 240; *Stewart* v. *Dunham*, 115 U. S. 61, 64; *Hardenbergh* v. *Ray*, 151 U. S. 112, 118; *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276, 286; *Central Trust Co.* v. *Bridges*, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. Rep. 753; *Society of Shakers* v. *Watson* 37 U. S. App. 141, 155, 15 C.

C. A. 632, 638, 68 Fed. Rep. 730, 736. The objection to the jurisdiction of the circuit court cannot be sustained.

2. The mortgage on which this suit is based covers the franchises and all the property of the mortgagor. The appellants insist that the Terminal Company was a *quasi* public corporation and that it had no authority to make this mortgage, and they specially urge that it was without power to mortgage its franchises and after-acquired property. The Terminal Company is the creature of the State of Iowa. It was incorporated under the general laws of that state. It has the powers granted to it by those laws, together with those fairly incidental thereto, and it has no others. The Omaha Bridge Cases, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, 51 Fed. Rep. 309, 316. The statutes of Iowa then measure the powers of this corporation, and the construction of those statutes by the Supreme Court of that state and its determination of the extent of the powers and liabilities of corporations formed under them is authoritative in this Court. When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the National Courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. *Madden* v. *County of Lancaster*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, 65 Fed. Rep. 188, 192; *Dempsey* v. *Township of Oswego*, 4 U. S. App. 416, 2 C. C. A. 110, 51 Fed. Rep. 97; *Rugan* v. *Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; *Travelers' Ins. Co.* v. *Township of Oswego*, 19 U. S. App. 321, 330, 7 C. C. A. 669, 673, 59 Fed. Rep. 58, 61; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *Detroit* v. *Osborne*, 135 U. S. 492, 499. We turn then to the statutes and decisions of Iowa to learn whether this corporation was endowed with power to make this mortgage. When the Terminal Company was organized the statutes of Iowa provided that any number of people might become incorporated for the transaction of any lawful business, including the construction, ownership, operation and maintenance of railways, bridges or other works of internal improvement, that a corporation so formed should have the power to make contracts, acquire and transfer property, and should possess the

same power in such respects as private individuals enjoy, but should have no power not possessed by natural persons, except those expressly granted to it by those statutes (McClain's Annotated Code of Iowa, §§ 1608, 1609 Subdiv. 6); that before commencing business the incorporators should adopt articles of association and publish a notice, which should state, among other things, the general nature of the business to be transacted (McClain's Code, §§ 1610, 1611); that any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway should have power to issue its bonds for the construction and equipment of its railway and to secure their payment by executing mortgages or deeds of trust on the whole or any part of its property and franchises, and that such mortgages or deeds of trust might cover property acquired subsequent to their dates (McClain's Code, §§ 1955, 1965, 1966); that any number of persons or of railroad corporations, or of persons and railroad corporations, might form themselves into a body corporate, under the foregoing provisions of the statutes, for the purpose of constructing and maintaining union depots for freight and passengers, and that such a corporation should have the power to acquire by purchase or condemnation such real estate as the Railroad Commission should deem necessary for their depot and its approaches. (McClain's Code, §§ 2090, 2091.) According to the notice given by the publication of its articles of association under these statutes, the general nature of the business and the powers of the Terminal Company were "to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side tracks, depot yards, warehouses, storeage houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, * * * * and to mortgage, lease or sell the said grounds and improvements thereon." Under this state of facts, the argument of the appellants is, that this mortgage was *ultra vires* the corporation, because the Terminal Company was a quasi public corporation and had no implied power to mortgage its property, because the power to mortgage its franchises and after-acquired property was not claimed in its articles of incorporation, and because it was

organized under sections 2090 and 2091, *supra*, relating to corporations to construct union depots, and these sections give such corporations no power to mortgage their property. But this was not a corporation organized for the sole purpose of constructing union depots. On the other hand, the description of the general nature of its business in its articles of incorporation makes no reference to any union depot and expressly states that its business is, among other things, to construct and operate one or more lines of railway. Conceding, but not deciding, that a quasi public corporation has no implied authority to mortgage its property, such a corporation has express authority to do so under the laws of Iowa which we have cited (McClain's Code, §§ 1608, 1609), and that power is not restricted or lost by a failure to claim it in the articles of association. The statutes of Iowa do not require the powers of a corporation organized under them to be enumerated in its articles, and an omission to claim any of these powers would not leave the corporation so organized powerless. Thus in *Thompson* v. *Lambert*, 44 Ia. 239, 243, the incorporators limited the objects of a county agricultural society to "the improvement of agriculture, horticulture, mechanic arts, rural and domestic economy." In answer to the contention that the society had no authority to mortgage its property because that power was not enumerated in its articles, the Supreme Court of Iowa said:

"The power to borrow money, execute notes and mortgages was neither assumed nor prohibited. In the absence of any such prohibitory provision the power to borrow money, execute notes and mortgages, as evidences of and security for indebtedness created for the necessary and proper purpose of carrying out the objects of the corporation impliedly exists. For the purpose of effecting the objects of the corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited."

All doubt of the power of the Terminal Company to make this mortgage is, however, dispelled by the provisions of sections 1955, 1965 and 1966 of McClain's Annotated Code. They expressly authorize any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway to mortgage its franchises and all its property, whether acquired

before or after the execution of the mortgage. The Terminal Company was certainly organized to construct and operate a railway, whatever other objects its corporators had in view, and under these provisions, it had express authority to make the mortgage in suit. *Railroad Co.* v. *Howard*, 7 Wall, 392, 412.

3. Another position of counsel for the appellants is, that this mortgage is void, because it violates the rule against perpetuities, which in Iowa is embodied in this provision of its statutes:

"Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter." McClain Annotated Code of Iowa, 1888, § 3091. The argument in support of this position is founded upon this state of facts: On December 14, 1889, the Terminal Company leased to the Sioux City & Northern Railroad Company of Sioux City, Iowa, all its franchises and property for the term of 100 years for an annual rental of $90,000. The lease recited that the Terminal Company had been authorized by its stockholders and by its board of directors to make a first mortgage on its franchises and property to the Trust Company to secure the repayment of an amount not exceeding $1,250,000, and that it was about to do so. It contained a permit to the railroad company to sublet the premises and covenants by the railroad company that it would pay $75,000 and as much more of its annual rental as should be necessary to pay the expenses of the trusteeship to the Trust Company, to be applied to the payment of the interest on the mortgage bonds and to the payment of the expenses of the trusteeship. It also provided that if the lessee failed to pay the rent, the lessor might re-enter and take all the rights and remedies of the lessee against the sub-lessees, and that if default should be made in the payment of the interest on the mortgage bonds, all those rights and remedies should inure to the benefit of the Trust Company or of the purchasers under the mortgage. On January 1, 1890, the Terminal Company made to the Trust Company the mortgage in suit, under the form of a trust deed, to secure the payment of bonds due in ten years to an amount not exceeding in the aggregate $1,250,000. This mortgage recited the lease to the railroad company and its provisions for the benefit of the Trust Company and the bondholders. By its

terms, the Terminal Company transferred and conveyed to the Trust Company all its franchises and property, including all its rights and privileges under the lease to the railroad company. The third article of the mortgage provided that the Terminal Company transferred to, and vested in the Trust Company all the powers, rights and remedies which it had for the collection annually of the $75,000 and the expenses of the trusteeship, which the railroad company had promised to pay to the trustee by its covenants in the lease, that in case of a default of the Terminal Company in the payment of the bonds or the coupons, it would assign to the Trust Company its lease to the railroad company and the rentals due thereunder, and that the Trust Company and the purchaser under the mortgage should be entitled to all the rentals from the sub-lessees. The sixth article of the mortgage gave to the Trust Company the option in case of default to take possession of the mortgaged property, to operate it and collect the income, rents and profits from it, until the principal and interest of the bonds were paid or until the property was sold. The seventh article declared that the provisions of the preceding article were cumulative to the ordinary remedy by foreclosure in the courts, that a majority of the bondholders might require the trustee to avail itself of this remedy and that in the absence of their direction, it might do so at its discretion. The ninth and tenth articles provided that the trustee might purchase at the foreclosure sale, and that a majority in interest of the bondholders might control the exercise of every option given to the Trust Company by the terms of the mortgage. The position of counsel for the appellants is that this mortgage violates the rule against perpetuities, (1) because the lease and the mortgage in fact constitute a tripartite agreement which might suspend the power of the trustee and the bondholders to possess and convey the property mortgaged upon a condition precedent, to-wit: The termination of the lease or the default of the lessee, which might not be fulfilled until 100 years from the date of the lease, (2) because the provisions of the third and sixth articles of the mortgage for the collection by the trustee of the $75,000 and the expenses of the trusteeship annually from the lessee and for the assignment of the lease to the Trust Company by the mortgagor and

the surrender to it of all the rights of the Terminal Company to the rents and income accruing under the lease, in case of the mortgagor's default, tend to prove the suspension of this power and to render the interest of the trustee too remote, and (3) because the powers given to a majority of the bondholders to control the exercise of the options allowed to the trustee in the mortgage have the same tendency. But there is nothing in these two instruments but a lease for 100 years and a mortgage by the lessor of its reversion and of the rents accruing to it from the lessee to secure the payment of its bonds due in ten years. Gray says that the true form of the rule against perpetuities is that "no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Gray's Rule against Perpetuities, § 201. But a vested interest is not subject to the rule against perpetuities, because it is vested and by its very nature it cannot be subject to a condition precedent. For this reason, reversions and vested remainders are exceptions to the rule, and leases for terms far longer than lives in being and twenty-one years are valid, both at common law and under the statute of Iowa, notwithstanding the suspension of the power of the lessors to take actual possession and to convey the property free from the lease. Gray's Rule against Perpetuities, §§ 205, 736; *London & South Western Railway Co.* v. *Gomm*, 20 Chan. Div. 562, 574; *Toms* v. *Williams*, 41 Mich. 552, 572; *Todhunter & Williamson* v. *D. M. I. & M. R. Co.*, 58 Ia. 205, 207. When this is said, all is said. All the remoteness challenged in this case as obnoxious to the rule or the statute is due to the lease and not to the mortgage. The debt secured by the latter falls due by the terms of the bonds in ten years from the date of the mortgage, and the trustee and the bondholders are then entitled, if the debt is not paid, to take possession of and to sell and convey every interest which the lessor reserved under the lease. It is admitted that a mortgage of an unincumbered title to secure a debt due in ten years would not violate the rule. But this mortgage is not more obnoxious to it. The reversion, the right to the rents under the lease and the right to re-enter in case of the failure of the lessor to pay them were all valid in the hands of the lessor notwithstanding their remoteness. The only effect of the

mortgage was to pledge as security remote but valid interests of the mortgagor and to give the right to the possession and sale of them if the debt and interest secured were not paid within ten years. If any of those interests were remote, they were made so by the lease and not by the mortgage, and they were valid because leases are excepted from the rule. The mortgage, therefore, did not offend against either the rule or the statute against perpetuities. Nor is it material whether the lease and the mortgage should be considered as separate instruments or as a single tripartite agreement. If the parties could have lawfully made the lease and the mortgage as separate instruments, a tripartite agreement between them which contained all the terms of the lease and the mortgage must be equally valid. The position that the mortgage and the lease or either of them violate the rule against perpetuites must be overruled.

4. But the appellants insist that the mortgage is void, because the debt which it secures is in excess of the amount of indebtedness which the Terminal Company had the power to contract. The law of Iowa under which this corporation was organized provided that the incorporators must, before commencing any business, except that of their own organization, adopt articles of incorporation and that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock;" provided that these provisions shall not apply to certain classes of bonds, among which we concede for the purpose of this discussion and decision, but do not decide, that the bonds of this corporation do not fall. McLain's Code, §§ 1610, 1611. The articles of incorporation of the Terminal Company declare that its authorized capital stock is $1,000,000 and that "the highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." Those articles, however, did not enlarge the powers of the corporation beyond those granted by the statutes under which it was created and, under the concession we have made, they gave it no authority to incur an indebtedness in excess of

$666,667. A corporation may not enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its articles of incorporation. 5 Thompson on Corporations, § 5996. The indebtedness secured by this mortgage was $1,250,000 and each bond recited that it was one of a series of bonds not exceeding in the aggregate $1,250,000 and that it was secured by a first mortgage upon the property of the Terminal Company. This debt was, therefore, in excess of the statutory limitation. The mortgage was duly recorded in the office of the proper Register of Deeds at Sioux City on February 27, 1890, and from that record and the terms of the bonds it is a fair inference that the Trust Company and the bondholders had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being. On the other hand, the bonds were sold on the credit of the mortgage for 90 per cent. and 95 per cent. of their par value and their proceeds were applied by the mortgagor to the payment of its debts and to the purchase and improvement of its property. Neither the bondholders nor the Trust Company were guilty of any fraud or bad faith in the transaction. The debt was not created nor was the mortgage made or accepted with any intent to defraud any of the existing or subsequent creditors of the corporation. Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subsequent creditors any better standing to assail it? These are the crucial questions in this case.

This is a suit in equity. The Terminal Company has received the full benefit of the proceeds of these bonds and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage were not without the general scope of its powers, but they were the result of an excessive exercise of one of those powers. The corporation had, as we have seen, the general power to borrow money and to secure its repayment by a mortgage. If the aggregate amount of the bonds secured by this mortgage had been $650,000 instead of $1,250,000, they would have been valid in the absence of other indebtedness. The bonds and mortgage did not, like the lease in *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St.*

Louis, Alton, &c., Railroad Co., 118 U. S. 290, 309; *Oregon Railway & Navigation Co.*, v. *Oregonian Ry. Co.*, 130 U. S. 1, 23, and *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 50, disable the corporation from performing its obligations to the government and to the public, nor were they, like those leases, beyond the scope of the general powers of the corporation that made them. The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it and the debtor cannot usurp its functions. *National Bank* v. *Matthews*, 98 U. S. 621, 629; *Fritts* v. *Palmer*, 132 U. S. 282, 292; *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 76; *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240, 251. The creation of this indebtedness and the execution of these bonds and this mortgage involve no moral turpitude. The articles of incorporation and the mortgage were spread upon the proper public records, so that all who subsequently dealt with the corporation could see what it had done. The bonds and mortgage had in them no element of fraud, deceit or misrepresentation. They were not evil in themselves. The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts and soon enough for him to set them aside when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains, nor is it any defense for a private corporation against the enforcement of an executed contract whose benefits it holds, that while its execution was within the general scope of its powers it involved an excessive exercise of one of them. While it retains the benefits of such a

contract, it silently affirms and may not be permitted to deny its validity. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99, 102; *Humphrey* v. *Patrons' Mercantile Association*, 50 Ia. 607, 610, 612; *Garrett, Trustee*, v. *Burlington Plow Co.*, 70 Ia. 697, 701; *Warfield* v. *Marshall County Canning Co.*, 72 Ia. 666, 672; *Manchester & L. R. R.* v. *Concord R. R.*, 20 Atl. Rep., 383; *Poole* v. *West Point Butter & Cheese Association*, 30 Fed. Rep. 513, 520; *Allis* v. *Jones*, 45 Fed. Rep. 148, 150; *Parish* v. *Wheeler*, 22 N. Y. 494; *Hays* v. *Galion Gas Light & Coal Co.*, 29 Oh. St. 330, 340; *Bissell* v. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258; *McCluer* v. *Manchester and Lawrence Railroad*, 13 Gray 124; *Bradley* v. *Ballard*, 55 Ill. 413, 418; *Rutland & Burlington Railroad Company* v. *Proctor*, 29 Vt. 93. Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. In *National Bank* v. *Matthews*, *supra*, a bank had made a loan on the security of a note and a mortgage upon real estate under the form of a deed of trust, in violation of sections 5136 and 5137 of revised statutes and was proceeding to enforce collection of its debt by a sale under the trust deed, when one of the state courts enjoined the sale at the suit of one of the mortgagors, on the ground that the loan by the bank on real estate security was forbidden by law and the trust deed was void. The supreme court reversed that decree and allowed the bank to enforce its contract. In *Humphrey* v. *Patrons' Mercantile Association*, *supra*, the Supreme Court of Iowa compelled a corporation to pay to the guilty agent who had contracted it an indebtedness in excess of the limitation prescribed by the statute, and in *Garrett, Trustee*, v. *Burlington Plow Co.*, *supra*, that court enforced the collection of a debt in excess of the statutory limitation against a corporation and in favor of its directors by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves. These decisions do not rest upon the principle of *estoppel*, nor depend upon the creditors' ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts.

5. But it is said that the creditors of this mortgagor are entitled to a declaration that this mortgage is void and that they have rights here superior to the corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the State of Iowa, whose standing in this respect is certainly as high as that of any of the creditors who have appealed. A brief statement, however, of the transactions out of which its claim has arisen, will show, we think, that this position of its counsel is untenable. In the latter part of the year 1889, the Terminal Company commenced to issue its promissory notes for $5,000 each, and to negotiate them through the Union Loan & Trust Company of Sioux City, a corporation which endorsed and sold them to banks located in the Eastern states. The proceeds of these notes were used by the Terminal Company to purchase and improve its property. Early in 1890, the aggregate amount of these notes had reached $1,250,000. It will be remembered that the Terminal Company made its lease to the Sioux City & Northern Railroad Company on December 14, 1889, and its first mortgage to the Trust Company on January 1, 1890. The bonds secured by this mortgage, with the exception of 250 of them which were disposed of in 1892, were sold early in the year 1890, and their proceeds were used to pay some of the Terminal Company's notes and to buy and improve its property. There were, however, some of its outstanding notes that were not paid, and as these fell due, the Terminal Company made new notes, the Union Loan & Trust Company endorsed and sold them and with their proceeds paid the notes which were falling due. In this way the notes of the Terminal Company which were outstanding on April 25, 1893, were renewals of, or substitutions for, some of the notes issued by that company in 1889 and 1890, but it does not appear that any of the banks which held the notes of the company in April, 1893, ever had any of the notes first issued for the original indebtedness of the corporation. The outstanding notes of the Terminal Company on April 25, 1893, aggregated $718,000. They were held by banks located in the Eastern states, and none of them were made or dated earlier than January 1, 1892. In April, 1893, the Terminal Company made a trust deed of all its property to the Union Loan & Trust Company to secure the payment of these

notes. This deed recited that it was subject to the mortgage in suit. The Union Loan & Trust Company, the trustee in this deed, subsequently made a general assignment of all its property and interests to E. H. Hubbard, as trustee. In December, 1893, the Terminal Company assigned all its property to E. H. Hubbard, in trust, to sell the same and apply the proceeds to the payment of its notes. The Credits Commutation Company subsequently became the owner of these outstanding notes of the Terminal Company to the aggregate amount of $616,000. It thereupon sued that company upon these notes in one of th state courts of Iowa, obtained a judgment for their amount and interest on July 23, 1895, had an execution returned unsatisfied and then intervened in this suit, which had been commenced in 1894. E. H. Hubbard, the trustee under the second mortgage and under the assignment of the Terminal Company, is one of the parties to this suit and one of the appellants in this case, so that the rights of the owners of these notes under their second mortgage of April, 1893, under their trust deed of December, 1893, and under their judgment of July 23, 1895, are all here for adjudication. But how can they establish any rights as against the first mortgage upon this property superior to those of the the mortgagor? The equities of the appellants who own these notes cannot be higher than those of their original holders and they became creditors of this corporation subsequent to the sale of all but 250 of the bonds, and probably subsequent to the sale of those. Subsequent creditors stand in the shoes of the mortgagor where the prior mortgage is not obtained and accepted by the mortgagees with intent to defraud them, and this mortgage certainly was not. *Graham* v. *Railroad Company*, 102 U. S. 148, 153; *Mattingly* v. *Nye*, 8 Wall. 370; *Sexton* v. *Wheaton*, 8 Wheat. 229. Moreover, whether the holders of these notes became creditors before or after the bondholders did, they have established no right to attack this mortgage superior to that of the mortgagor. They could maintain no superior equitable claim to attack it, unless they proved that the mortgage was made by the corporation and was obtained and accepted by the trustee and the bondholders with the intent to deceive and defraud them, and that it did deceive and defraud them, and there is no such evidence in this case. They have no legal lien upon the mort-

gaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors. *Warfield* v. *Marshall County Canning Co.*, 72 Ia. 666, 670, 672; *Garrett, Trustee*, v. *Burlington Plow Co.*, 70 Ia. 697, 700, 701, 702; *National Bank* v. *Whitney*, 103 U. S. 99, 103.

6. Another objection to the validity of this mortgage is that the president and secretary of the Terminal Company who executed it on behalf of that corporation, had no authority to do so, because some of the provisions of the mortgage are not identical with those contained in the resolution of the board of directors which authorized its execution. But the Terminal Company delivered this mortgage to the Trust Company, signed by its president and secretary and sealed with its corporate seal. This was *prima facie* evidence that it was executed on behalf of the corporation by lawful authority. *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. Rep. 309, 327; *Burrill* v. *Nahant Bank*, 2 Met. 163, 166; *Canandarqua Academy* v. *McKechnie*, 90 N. Y. 618, 629; *Wood* v. *Whelen*, 93 Ill. 153, 162; *Southern California, &c. Association* v. *Bustamente*, 52 Cal. 192. The mortgage recited that it was duly authorized by a proper resoluion of the board of directors, and each of the bonds recited that it was secured by a mortgage or deed of trust duly made and delivered to the Trust Company which was a first lien upon all the property of the Terminal Company. Upon these representations the Terminal Company sold these bonds and obtained their proceeds. It is too late now for this corporation or for creditors claiming under it through deeds or liens subsequent to the date of the record of this mortgage, to deny the power of its officers to make it. A corporation which induces lenders or purchasers to loan it money or to buy its bonds by delivering a mortgage formally executed, which purports to secure them, is thereby estopped from denying its validity on the ground that in giving its officers authority to make it, it failed to comply with some law or rule of action, with which it might have complied, but which it wilfully or carelessly disregarded. *Union Pacific Railway Co.* v. *Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 188, 191; 2 C. C. A. 174, 239, 241, 51 Fed. Rep. 309, 326, 328; *Zabriskie* v. *Railroad Co.*, 23 How. 381, 397, 400, 401.

7. Finally, the appellants assail the decree because it directs the sale of the mortgaged property as a whole and does not reserve to the mortgagor and to subsequent lienors the right of redemption from the sale in accordance with the provisions of the statutes of Iowa relative to sales of real property under execution. McClain's Annotated Code of Iowa, §§ 4317, 4331. But this statutory right of redemption and right to a sale in separate parcels does not extend to the real estate of a corporation which is mortgaged with its franchise to acquire, hold and use property for public purposes and whose chief value depends upon its unity and its use for, and appropriation to those purposes. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 90. The decree below was right and it must be *affirmed* with costs. It is so ordered.

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